

cert. denied, 403 U.S. 923 (1971); Columbia Broadcasting System v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

The Commission has ample reason to justify the immediate application of the Pioneer's Preference. Use of the preference is likely to expedite service to the public. Moreover, that service is likely to be rendered in areas which have little or no other broadcast service. And, since most of those taking advantage of the Pioneer's Preference are likely to be newcomers (including minorities and women), use of the Pioneer's Preference will also promote the Commission's paramount goal of diversifying the media voices in the country.

It is of course true that some parties have expended time and money on the basis of the Commission's existing policies. But that circumstance -- which exists every time an agency changes policy and applies it to pending cases -- is not a major concern here. Since the Pioneer's Preference would not be applied to cases already designated for hearing, the amount of funds expended will be minimal. And, if it wants to ameliorate the adverse consequences of the new policy, the Commission could offer to refund application fees to those parties who dismiss their respective applications as a result of the adoption of the new policy. In no event, however, should applicants for a broadcast facility -- who do not have vested rights -- be able to frustrate the Commission's desire to change policy in order to better serve the public interest.

Conclusion

WHEREFORE, in view of the foregoing, it is respectfully requested that the Commission adopt the Pioneer's Preference proposed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, this ~~8th~~ day of March, 1991 caused a copy of the Comments on Petition for Reconsideration of the National Association for the Advancement of Colored People to be mailed via first class mail, postage prepaid, to the following:

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In the Matter of)
)
Petitions of Jeffrey Rochlis) RM Nos. 7740
and Larry G. Fuss to Reform) 7741
the Comparative Broadcast)
Hearing Process)

To: The Commission

RESPONSE TO COMMENTS

Jeffrey Rochlis, petitioner in RM No. 7740, hereby responds to the comments in the above-referenced proceedings. More specifically, Rochlis requests that, in light of the record established in the above-referenced matters, the Commission issue a Policy Statement which would (1) create a "pioneer's preference" in accordance with the parameters proposed in Rochlis' petition, and (2) apply that pioneer's preference in all comparative proceedings involving applications designated for hearing after the date on which the Policy Statement is made effective.

I. Background

On March 8, 1991, Rochlis filed comments in General Docket No. 90-264, the Commission's proceeding concerning the reform of the comparative broadcast hearing process. In those comments, Rochlis proposed that the Commission amend the comparative criteria to include a pioneer's preference for an applicant which successfully secured a Commission order al-

locating a new FM or television station. The preference would also be available to any party which participated in the rulemaking proceeding and proposed a viable alternative allocation. The preference would thus be available to every party which expended time and money to find a new station.

Rochlis further proposed that the pioneer's preference be equal in weight to twice the weight presently accorded to the 100 percent integration of an applicant's owners into station management. The attribution of this substantial weight to the preference would yield significant public benefits. The preference would discourage the filing of competing applications in most situations and thereby expedite the initiation of the new broadcast service. The expedition of service to the public without a comparative hearing would also enable the Commission to avoid the expenditure of its limited resources on lengthy comparative proceedings (whose costs to the agency far exceed the hearing fees collected). And, perhaps most importantly, a pioneer's preference with substantial weight would be far more effective than present policies in creating new opportunities for minorities to become broadcast licensees.

This last conclusion was premised on the exorbitant -- and often prohibitive -- expense involved in prosecuting an application in a comparative proceeding involving as many as ten or more applicants. Those costs can easily escalate to

\$100,000 and sometimes even more than \$200,000. Those prosecution expenses have forced many minorities to seek financial assistance from non-minority investors who become so-called "passive investors" in a two-tiered organization (a corporation or a limited partnership). Since the costs of securing a new allocation are almost always far less than the cost of a comparative proceeding, minorities could use the pioneer's preference to become broadcasters more quickly and without the need for non-minority investors.

In its meeting of May 9, 1991, the Commission expressed support for Rochlis' proposal and the need to expedite its consideration. However, the Commission declined to act on Rochlis' proposal in the context of General Docket No. 90-264. Instead, the Commission decided to treat Rochlis' comments as a petition for rulemaking. Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, FCC 91-154 (May 15, 1991) at ¶¶25-28, 33.

On May 16, 1991, Larry G. Fuss filed a petition for rulemaking proposing a preference to an applicant which secures a Commission order allocating a new FM channel. The Fuss petition did not specify the precise weight to be accorded the preference. Fuss stated that his proposed preference would be particularly useful for "stand-alone" AM licensees who need the economic benefit of a companion FM station in the same market.

Rochlis' and Fuss' petitions were placed on Public Notice on June 24, 1991.¹

II. Comments

Rochlis' proposal was supported by Sacred Heart University, Inc. ("SHU"), which stated that a pioneer's preference would be particularly useful to parties seeking new educational FM allocations. SHU noted that the costs of finding new educational FM stations often entail considerably more expense than the location of a commercial FM station, a point of major concern to non-profit entities.

Fuss' proposal was supported by Fuss, the National Association of Broadcasters ("NAB"), and eight (8) letters.

Fuss' petition was opposed by the National Association for the Advancement of Colored People, the League of United Latin American Citizens, and the National Black Media Coalition (collectively referred to herein as the "Civil Rights Organizations"). The Civil Rights Organizations expressed concern that adoption of Fuss' proposal would "seriously erode" the opportunity for minorities to become broadcast licensees.

¹ Gerald Proctor had also filed a petition in September 1987 requesting the initiation of a rulemaking to adopt a finder's preference. That petition was placed on Public Notice in the same report as the Rochlis and Fuss petitions.

III. Public Benefits of Pioneer's Preference

None of the comments casts any doubt on the public benefits of Rochlis' proposal. That proposal is likely to expedite the initiation of new service to the public at far less cost to the Commission and the applicants than the current process; and although the Civil Rights Organizations are rightly concerned about the possible impact of any preference on the prospects for minority ownership, Rochlis' proposal is likely to better serve that interest than the current comparative hearing process.

A. Expedition of Service

At the outset, it should be emphasized that Rochlis' proposal would not prohibit the filing of competing applications or otherwise change the existing comparative criteria. Therefore, the award of a pioneer's preference would not foreclose competing applications or guarantee the "pioneer" that its application would be granted. Rochlis' comments of March 8, 1991 offered several hypothetical situations to illustrate how the preference would work in practice and how a non-pioneer applicant could prevail in a comparative proceeding. See Rochlis' Comments of March 8, 1991 at 7-8.

Adoption of a pioneer's preference, as explained more fully in Rochlis' comments, would therefore be consistent with the Supreme Court's decision in Ashbacker Radio Corp v. FCC, 326 U.S. 327 (1945).

Although the opportunity to file competing applications would remain intact, the pioneer's preference would discourage the filing of competing applications in many, if not most, situations. Other parties are unlikely to be willing to spend the time and money to prosecute an application against a competitor that has a very strong chance of succeeding -- especially in light of the new limits on settlement payments in comparative proceedings. See Amendment of Section 73.3525 of the Commission's Rules, 6 FCC Rcd 2901 (1991).

The importance of expedition cannot be overestimated. Although the Commission's recent reforms will shorten the process to some extent, comparative proceedings will still be incredibly time-consuming. Even in the best of situations, the Administrative Law Judge will probably not issue his or her Initial Decision until at least two (2) years after applications are filed. And if applicants utilize the numerous appeal rights available, the proceeding could take another two (2) years or more beyond that Initial Decision. Since the processing of a petition for a new FM or TV allocation can take one or two years, the entire process -- from the filing of the rulemaking petition to the conclusion of the comparative proceeding -- can easily take six (6) or more years.

The elimination of that delay will not only expedite service to the public on the new station. The elimination of the comparative proceeding will also enable the Commission to

conserve its limited resources and enable applicants to make better use of their limited resources.

B. Pioneer's Preference Benefits Minorities

In commenting of Fuss' petition, the Civil Rights Organizations expressed concern about the impact which that proposal might have on the opportunities for minorities to become new broadcast licensees. The Civil Rights Organizations did not expressly respond to Rochlis' comments on this issue, and, for that reason, it may be useful to explain in greater detail how his proposed preference will improve the opportunities for minorities to become broadcasters.

In order to appreciate the benefits of Rochlis proposal, it is first necessary to review the history and impact of the minority preference in comparative proceedings. That preference was established sixteen (16) years ago. TV 9, Inc. v. FCC, 495 F.2d 929, 938 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974). The court created the preference in light of evidence that, as of 1971, minorities owned only 10 of the approximately 7,500 radio stations and none of the more than 1,000 television stations in the country. See 495 F.2d at 937 n.8.

The Commission has never developed a quantitative analysis to assess the value of the minority preference in increasing minority ownership in broadcasting. See Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997, 3043 (1990) (O'Connor,

J., dissenting), citing the Commission's brief. However, the known statistics indicate that, after sixteen (16) years of use, the minority preference has done little to increase minority ownership. As early as 1982, a congressional report stated as follows:

It is clear that the current comparative hearing process has not resulted in the award of significant numbers of licenses to minority groups. Many minority applicants are simply unable to participate in comparative hearings which often take a considerable period of time and require substantial economic resources.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 44 (1982). See Shubert Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902, 949-50 (D.C. Cir. 1989) (Wald, C.J., dissenting). Subsequent experience did not produce better results. As of 1986, minorities owned only 2.1 percent of the more than 11,000 radio and television stations in the United States. Metro Broadcasting, Inc. v. FCC, supra, 110 S. Ct. at 3003. Accord Civil Rights Organizations' Opposition to Petition for Rulemaking (July 24, 1991) at 5 (minorities own less than 3 percent of country's broadcast stations).

This small growth in minority ownership is even more glaring in light of the availability of the distress sale policy and tax certificates for minority sales. These regulatory tools are also used to increase minority ownership, and the evidence indicates that they account for the overwhelming bulk of the increase in minority ownership. Since 1978 the

Commission has approved 38 distress sales and 261 tax certificates. In other words, the minority preference in comparative proceedings appears to have had only minimal impact in increasing minority ownership.

In part, the lack of success of the minority preference reflects the ability of other applicants to develop better comparative applications without a minority preference. E.g. Jarad Broadcasting Co., Inc., 1 FCC Rcd 1267 (Rev. Bd. 1986) (subsequent history omitted); Metro Broadcasting, Inc. v. FCC, supra, 110 S.Ct. at 3026 n.50. As the 1982 congressional report indicated, the paucity of success also reflects the financial dynamics of prosecuting an application in a lengthy comparative proceeding. Many, if not most, minority applicants have limited resources and are forced to utilize funds supplied by non-minority investors who become so-called passive investors in a two-tiered organization. However, the practical reality is that very few investors are willing to part with their money and control; as a result, many two-tiered applicants have been disqualified as "shams" because the so-called passive investors could not resist becoming actively involved in the management of the applicant. Indeed, the frequency of this phenomenon led the Commission initially to propose a repeal Anax Broadcasting, Inc., 87 FCC 2d 483 (1981), which fostered the use of two-tiered organizations in comparative situations. See Proposals to Reform the

Commission's Comparative Hearing Process, 5 FCC Rcd 4050, 4053 (1990). Although the Commission eventually decided to retain the Anax policy, the prospect of disqualification still looms large for minority applicants involved in two-tiered organizations. See Royce International Broadcasting, 5 FCC Rcd 7063 (1990), recon. denied, 6 FCC Rcd 2601 (1991).

Rochlis' proposal would not involve any diminution in the minority preference for comparative proceedings. Quite the contrary. Adoption of the pioneer's preference proposed by Rochlis will enable minorities to use that preference with better success than appears probable under the current regulatory scheme.

Although the costs of finding a new allocation can be considerable, they are significantly less than the costs of prosecuting an application in a comparative proceeding over several years. Therefore, minorities will probably be able to finance the costs of the allocation proceeding without the need for non-minority investors. If so, minorities would have complete control over their applications and avoid the kind of inquiries conducted almost routinely with respect to the bona fides of their applications.

Another factor further enhances the likelihood of a minority pioneer's success. A minority applicant securing the allocation will stand in better stead than virtually every other party. The minority applicant will have the benefit of

both the minority preference and the pioneer's preference -- a combination that would be unbeatable except in the most unusual circumstances.

The plight of Reverend H. H. Lusk exemplifies the benefits that could accrue to minority ownership from adoption of the pioneer's preference. Reverend Lusk, a black minister, succeeded in having the Commission allocate a new FM channel to Seaside, California in 1988. Amendment of Section 73.202(b), 3 FCC Rcd 2138 (MMB 1988). If the pioneer's preference had been in effect, it is unlikely that any competing applications would have been filed; in that event Reverend Lusk would have received a construction permit some time in 1988. In the absence of a pioneer's preference, Reverend Lusk has been forced to expend considerable time and money to compete with thirteen (13) other applicants in a proceeding that was initiated by an HDO in September 1990 and will probably not be resolved for one or more years. See Dunlin Group, DA 90-1090 (MMB September 10, 1990).

A similar situation exists in a comparative proceeding for a new FM station in Fountain, Colorado. A black man (Freeman Harris) initiated the allotment proceeding for Fountain in 1988 in the name of his company, Express Communications. Amendment of Sections 73.202(b), 4 FCC Rcd 5672 (MMB 1989). Another party (Dr. Ronald A. Johnson) filed a competing proposal which was later withdrawn. The allocation was

made in 1989. Seven other parties filed competing applications, and the HDO was issued in 1991. Hubbard Broadcasting, Inc., DA 91-374 (MMB April 17, 1991). Rather than face the prospect of the time and expense of a comparative hearing -- where the result could not be known for years -- Harris entered into a settlement agreement for the dismissal of his application. If the pioneer's preference had been in place, Harris would have secured that preference; his application would have then been far superior to the applications of the other parties who later filed competing applications.²

To be sure, there will be situations in which non-minorities will secure a pioneer's preference. But there is no reason to believe that current broadcast licensees or other non-minorities will be able to foreclose minorities from acquiring their fair share (if not more) of new allocations.³

It should also be remembered that, under Rochlis' proposal, the pioneer's preference would be available to the

² If he had not withdrawn his proposal, Johnson would have also secured a pioneer's preference. However, Johnson is not a minority. Therefore, Harris -- with both a pioneer's preference and a minority preference -- would still have been the superior applicant.

³ It is noteworthy that no commercial broadcasters filed any formal comments in support of Rochlis' proposal, and the Fuss proposals attracted the comments of only four broadcasters (who wrote virtually identical letters) and the NAB, whose interest appears to be primarily motivated by the desire to assist struggling AM licensees. If the Pioneer's Preference were attractive to existing broadcasters, greater comment from the broadcast industry could have been expected.

party filing the initial rulemaking as well as any other party filing a viable counter-proposal. Therefore, if a minority filed a counter-proposal to a petition, the minority proponent would be accorded both a minority preference and a pioneer's preference; in that event, the minority applicant would be able to prevail over virtually any competitor, including the party who filed the initial rulemaking petition.

Finally, there is no basis for concern that minorities will not have the knowledge to pursue new allocations. The Commission and the Civil Rights Organizations, as well as other groups interested in minority ownership, have been extremely successful in publicizing the benefits of minority preferences, tax certificates, and the distress sale policy. Those entities could be equally successful in promoting the availability of the pioneer's preference as a vehicle to increase minority ownership on an expedited basis with far less costs than comparative proceedings. Minority entrepreneurs could be advised to take the initiative by filing their own petitions for rulemaking or to file counter-proposals in proceedings initiated by a petition filed by someone else.

In sum, the pioneer's preference promises to provide a greater benefit at lower costs than the benefit which was promised -- but to date has not materialized -- from the use of minority preferences in comparative proceedings.

IV. Issuance of Immediate Policy Statement Needed

As Rochlis explained in a supplemental memorandum, the Commission has the authority to adopt the pioneer's preference through a Policy Statement without the need for further rulemaking proceedings.⁴ See Proposals to Reform the Commission's Comparative Hearing Process, supra, FCC 91-154 at ¶28. The public would benefit by the immediate issuance of such a Policy Statement. Further rulemaking proceedings would necessarily delay the implementation of a pioneer's preference and thereby further frustrate the ability of minorities and others to secure the public benefits which the preference offers. Moreover, there is no reason to believe that the initiation of a rulemaking will provide any more comments than have already been received.

This last point warrants elaboration. The pioneer's preference is not a new concept. Commissioner Quello has been urging the adoption of such a preference for many years, and Gerald Proctor filed his petition on the issue in 1987. Therefore, there has been ample public discussion of the issue, and the petitions placed on Public Notice would have generated more comment if there were greater interest among vested interests.

⁴ That memorandum is annexed hereto and incorporated herein by reference.

The minimal comment on the three petitions no doubt reflects the fact that the pioneer's preference will be utilized primarily by minorities and other newcomers who rarely file comments in rulemaking proceedings. Conversely, if the vested broadcast interests viewed the pioneer's preference as a significant benefit to them, it can be assumed that there would have more comments from that sector.

Finally, it is worth noting that a Policy Statement, unlike a rule, will afford the Commission and interested parties greater flexibility in addressing the implementation of the rule in specific situations in order to ensure fairness to parties and maximum benefit to the public. Indeed, none of the existing criteria -- including those for minority and women -- was adopted through a rulemaking proceeding. See TV 9, Inc. v. FCC, supra; Mid-Florida Television Corporation, 69 FCC 2d 607, 650-51 (Rev. Bd. 1978) (subsequent history omitted). There is no reason to proceed differently with the pioneer's preference.

Conclusion

WHEREFORE, in view of the foregoing, it is respectfully requested that the Commission adopt a Policy Statement incorporating the pioneer's preference proposed by Rochlis.

Respectfully submitted,

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EX PARTE PRESENTATION

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Re: "Pioneer's Preference"
Proposed in General Docket No. 90-264

This memorandum addresses the issue whether the Commission can adopt the "Pioneer's Preference" proposed in the comments of Jeffrey Rochlis without violating the public notice and comment provisions of the Administrative Procedure Act ("APA") as set forth in Section 553(b) of Title 5 of the United States Code. This memorandum concludes that (1) the Pioneer's Preference, like other comparative criteria, would constitute a general statement of policy not subject to the APA's rulemaking provisions, and (2) even if those provisions were applicable, there has been adequate public notice to support adoption of the Pioneer's Preference.

I. Nature Of Proposal

Although the contours of the Pioneer's Preference are set forth in Rochlis' comments of March 8, 1991, it may be useful to reiterate what the proposal involves and what it does not involve.

In essence, the Pioneer's Preference would be awarded to an applicant who had initiated a rulemaking proceeding which resulted in the allocation of a new FM or television station. The Pioneer's Preference would also be awarded to any other party who had participated in the rulemaking and proposed a viable alternative (since that other party would have also expended time and money in an effort to find new service for the public). The Pioneer's Preference would be a credit in any subsequent comparative proceeding for the new allocation.

The weight of the Pioneer's Preference would be substantial and at least the equivalent of twice the weight presently assigned to the full-time integration of 100 percent of an applicant's owners.

The award of a Pioneer's Preference would not deprive any competing applicant of a full hearing on its application. The Pioneer's Preference would simply be another factor, albeit of substantial weight, to be considered in the comparative process. In many, if not most, situations, the Pioneer's Preference would be sufficient to discourage the filing of competing applications. However, there are circumstances under which another applicant could be comparatively superior to the pioneer. See Rochlis' Comments at 7-8.

It is proposed that the Pioneer's Preference be applied to future applications and to pending applications which have not yet been designated for hearing. The foregoing approach will minimize any adverse financial impact on parties with

applications on file with the Commission. An applicant usually does not incur substantial financial costs until after the applications are designated for hearing. To the extent it wanted to further ameliorate any adverse financial impact, the Commission could agree to refund all or a portion of the application filing fee for pending applicants who chose to voluntarily dismiss their respective applications within a specified time period (i.e. within 30 days after adoption of the Pioneer's Preference). Even a refund of all application fees for dismissing applicants would probably be substantially less than the cost which the Commission would incur in processing the applications.

II. Administrative Procedure Act Inapplicable

Subsection 553(b) requires publication in the Federal Register of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b). However, the foregoing provision does not apply to "general statements of policy." 5 U.S.C. §553(b)(A).

The APA does not define the term "general statements of policy." The United States Attorney General did issue a manual contemporaneously with the enactment of the APA, and that manual defines the term as a "statement issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947). See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense

Council, 435 U.S. 519, 546 (1978) (Attorney General's Manual accorded special deference because of timing of publication and role played by the Department of Justice in drafting legislation). As one court more recently explained, a general statement of policy is "neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications." Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974) (footnote omitted).

An agency pronouncement qualifies as a statement of policy if it satisfies two criteria: first, it "must operate only prospectively," Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1014 (9th Cir. 1987); and, second, the agency must "remain[] free to consider the individual facts in the various cases that arise . . ." Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir. 1983), cert. denied, 466 U.S. 927 (1984). In contrast to a rule, then, a general statement of policy "is not finally determinative of the issues or rights to which it is addressed." Pacific Gas & Electric Co. v. FPC, supra, 506 F.2d at 38. Rather, a general policy leaves the agency free to exercise its discretion upon consideration of particular facts and circumstances in individual cases. Guardian Federal Savings & Loan Association v. FSLIC, 589 F.2d 658, 666-67 (D.C. Cir. 1978).